Supreme Court of the United States.

DECEMBER TERM, 1872.

EDWARD RYAN, Plaintiff in Error,
vs.
CAUFFMAN KOCH et al.
} No. 183.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MICHIGAN.

BRIEF FOR DEFENDANT IN ERROR.

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v.
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STATEMENT.

Prior to the 7th May, 1870, Ryan was indebted to Koch & Co. in the sum of $3,026 51, for goods sold and delivered. On the 7th May, 1870, a settlement of the account was made between the parties, and besides a certain payment by check, not now in controversy, Ryan drew and delivered to the agent of Koch & Co. an order of that date, in the following words:

"HANCOCK, *May* 7, 1870.

"$2,700.

"To SOUTH PEWABIC COPPER COMPANY:

"Pay to Koch, Mayer & Goldsmith, or order, the sum of twenty-seven hundred dollars, for value received, and charge to my account. EDWARD RYAN."

This order not having been paid by the Copper Company, Ryan, on the 2d July, 1870, was called upon by Koch & Co. to pay the amount thereof, which he refused. There-

upon this action of assumpsit was commenced in the circuit court for the eastern district of Michigan, counting upon the non-payment of said order, and with the common counts for goods sold and delivered, &c. (Rec., pp. 3, 6, 7, 8.)

At the trial there were two points in dispute:

First. Whether said order was accepted by Koch & Co. in payment of their demand; and—

Second. Whether Ryan, on the occasion of its delivery to Koch & Co., waived strict notice of a default of payment thereof by the Copper Company. (Rec., pp. 6, 7.)

The evidence of the plaintiff below tended to prove that, "at the time it was agreed that said draft should be taken, Ryan stated that said company was not in the habit of paying promptly, and usually paid as they received returns from their copper sold, which was monthly; that as such returns from copper were received, said company generally paid the proceeds to their creditors *pro rata*, and that the draft would probably be paid in thirty or sixty days; that said defendant promised said agent that he would pay said draft if said company did not, and that said draft was accepted by said agent on the express understanding that it was to be not in payment of the account of said plaintiffs against said defendant, but only as collateral thereto."

The evidence of the defendant Ryan on that point was, that said order was given and received in full payment of said account. (Rec., pp. 6, 7.)

On this point there was no exception to the charge of the court, and there is therefore nothing for review here.

The evidence of the plaintiffs below further tended to prove that on the 9th May, 1870, the plaintiffs' agent took said order to one Lewis, who it appears was the clerk of the Copper Company, and told Lewis that he wished to leave the order with him, and to have him send the avails, when collected, to the plaintiffs. Lewis said it would be paid probably within sixty days; and it appears that Lewis then accepted the order on behalf of the Copper Company. Said order was not paid by said company; and on the 2d

July, 1870, the plaintiff notified Ryan of that fact, asking him to pay the amount thereof, which he refused.

On this question of waiver of strict notice of non-payment, Ryan's evidence tended to show that he did not promise to pay the order if the Copper Company did not; but it did not in any other respect meet or contradict the evidence of the plaintiff, showing the mutual understanding between the parties that the strict rules of commercial transactions should not apply to the case. (Rec., p. 7.)

Upon this state of the evidence the court charged the jury upon this point, that if they should find "that the draft or order on the South Pewabic Copper Company was given and received with the understanding that it would not be paid immediately, but along from time to time within thirty or sixty days, as the company should receive returns from its products, then the necessity of presentation and notice of non-payment on the third day after acceptance by the company may be considered as waived; and the notice of non-payment by the letter from plaintiffs to defendant, of July 2d, 1870, was a sufficient notice to fix the liability of the defendant as drawer;" to which charge Ryan excepted. (Rec., p. 70.)

This is the whole case.

POINTS.

I.

Upon this record we are entitled to presume that the jury found that the order was not given in payment of the plaintiffs' debt; and if that be so, the plaintiffs were entitled to recover the amount of the balance of their account, independently of the question of notice, unless the defendant should have shown—which is not pretended—that he had been specially injured by the negligence of the plaintiffs in not prosecuting the collateral security with diligence.

A charge to warrant this finding of the jury for the plaintiffs was made, as appears in the record as "among other things." (Rec., p. 7.)

II.

But, supposing no other question existed in the case than the one in respect to which the charge was excepted to, then there was plainly no error.

The jury found, as the evidence tended to show, that the defendant waived the strict application of commercial rules, by inducing the plaintiffs to accept the order and give time upon it, both to the Copper Company and to the defendant, for thirty or sixty days; toward the end of which sixty days, failing to obtain payment from the Copper Company, they informed the defendant of the facts, and called upon him to pay the debt.

There does not seem to be any possible ground upon which to question the correctness of such a charge.

1. It was competent for the parties to agree that time should be given to the drawee of the order, and to agree that the holder of it should not call either upon the drawer or drawee within a fixed period of time.

2. No objection was interposed to the admissibility of parol evidence to prove such an agreement.

3. An objection to parol evidence upon such a point would have been fruitless had it been made.

4. The evidence plainly tended to prove that state of things.

The case of Brent *v.* Bank of the Metropolis, (1 Peters, 89,) and the opinion of Chief Justice Marshall therein, are conclusive upon this point.

The following authorities also support the proposition:

Gilson *v.* Gilson, 16 Vt., 464.
Hatch *v.* Hyde, 14 Vt., 25.
Lane *v.* Stewart, 20 Me., 98.
Sanborn *v.* Southard, 25 Me., 409.
Boyd *v.* Cleveland, 4 Pick., 525.
Taunton Bank *v.* Richardson, 5 Pick., 576.
Story on Bills, § 317, *note*.
Leonard *v.* Gary, 10 Wend., 504.
Norton *v.* Lewis, 2 Conn., 478.
Barry *v.* Morse, 3 N. H., 132.
Chitty on Bills, 506, *et seq*.

The whole matter is stated with perfect precision and clearness by Chief Justice Marshall in Brent *v.* Bank of the Metropolis, first above cited, in which he says:

"The plaintiffs in error contend that the testimony ought not to have been admitted, because it is an attempt, by parol proof, to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand at a stipulated place, instead of a demand on the person of the maker; and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply.

"No demand is necessary to sustain a suit against the maker. His undertaking is unconditional; but the indorser undertakes conditionally to pay if the maker does not; and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only where they are silent. We think, then, that there was no error in admitting the parol evidence which was offered to sustain the action.

"If the testimony was admissible, there is ~~an~~ error in the instruction given by the court. It was, that if the jury believed from the evidence that it was agreed by all the parties that the demand should be made at the Bank of the Metropolis, and that it was so made, then a demand of the maker was not necessary."

Argument additional to this statement of the Chief Justice appears to us would be—

"To gild refined gold."

GEO. F. EDMUNDS,
Of Counsel for Defendant in Error.

Appx—
Dec 1872

— Judge Davis

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~132~~ 373

THE NATIONAL BANK OF THE METROPOLIS, PLAINTIFF IN ERROR,

vs.

JAMES C. KENNEDY, RECEIVER OF THE MERCHANTS' NATIONAL BANK, ETC.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 20, 1870.

Dec. 21 1870

2. Taylor's Evidence 1082
Edition 1872

21 How 363